In the
Supreme Court of the United States

OCTOBER TERM, 1968

JEREMIAH STAMLER, M.D. and YOLANDA F. HALL,
Plaintiffs-Appellants,

vs.

HON. EDWIN E. WILLIS, et al.,
Defendants-Appellees,

MILTON M. COHEN,
Intervening-Plaintiff-Appellant,

vs.

HON. EDWIN E. WILLIS, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

HARRY KALVEN, JR.
University of Chicago
Law School
Chicago, Illinois 60637

RICHARD ORLIKOFF
33 N. Dearborn Street
Chicago, Illinois 60602

Attorneys for Intervening-Plaintiff-Appellant Milton M. Cohen

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
CHESTER T. KAMIN
DAVID C. ROSTON
RONALD J. CLARK
135 S. LaSalle Street
Chicago, Illinois 60603

ARTHUR KINOY
NANCY STEARNS
511 Fifth Avenue
New York, New York 10017

Attorneys for Plaintiffs-Appellants Jeremiah Stamler, M.D. and Yolanda F. Hall

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 S. LaSalle Street
Chicago, Illinois 60603

INDEX

	PAGE
Index	i
Table of cases	ii
Table of constitutional provisions and statutes	iii
Table of books, articles and reports	iv
Preliminary statement	1
I. A three-judge court was properly convened because appellants seek an injunction against enforcement of an Act of Congress	3
A. The rules establishing and governing the House Committee on Un-American Activities are embodied in and are an integral part of the Legislative Reorganization Act of 1946	4
B. This Court, the Committee and the Executive Branch uniformly have acknowledged that the Committee's existence and authority are based upon an Act of Congress	13
C. The dual source of the mandate of the Committee does not deprive the three-judge court of jurisdiction	15
D. In any event, a three-judge court is required to hear cases involving Rule XI of the House of Representatives	17
II. The grounds for affirmance advanced by appellees were unanimously and correctly rejected by the court below	21
Conclusion	27

TABLE OF CASES

	PAGE
Anderson v. Dunn, 6 Wheat. 204 (1821)	10
Baker v. Carr, 389 U.S. 186 (1962)	23
Barenblatt v. United States, 360 U.S. 109 (1959)	15
Bond v. Floyd, 385 U.S. 116 (1966)	19
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	23
DeGregory v. Attorney General, 383 U.S. 825 (1966)	
Deutch v. United States, 367 U.S. 456 (1962)	15
Dombrowski v. Pfister, 380 U.S. 479 (1965)	24, 25
Evers v. Dwyer, 358 U.S. 202 (1958)	26
Fischler v. McCarthy, 117 F.Supp. 643 (S.D.N.Y. 1954)	25
Flast v. Cohen, 392 U.S. 83 (1968)	17, 23
Florida Lime and Avocado Growers, Inc. v. Jacobson, 362 U.S. 73 (1960)	16
Gojack v. United States, 384 U.S. 702 (1966)	9, 10, 26
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	23
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	17
Kilbourn v. Thompson, 103 U.S. 168 (1880)	26
Krebs v. Ashbrook, 275 F. Supp. 111 (D.C. Cir. 1967), affirmed per curiam No. 21,382 (D.C. Cir. May 14, 1968)	4, 9, 16
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	26, 27
Marshall v. Gordon, 243 U.S. 521 (1917)	10
Methodist Federation For Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956)	18-19, 25

PAGE

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 37 F. Supp. 93 (E.D. Okla. 1941), aff'd 313 U.S. 508 (1941) 21

Pauling v. Eastland, 288 F.2d 126 (D.C. Cir. 1960) 25

Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968) ..19-20

Schneider v. Smith, 390 U.S. 17 (1968) 18

United States v. Rumely, 345 U.S. 41 (1953) 18

Watkins v. United States, 354 U.S. 178 (1957) 9, 15, 26

Whitehill v. Elkins, 389 U.S. 54 (1967) 24

Wilkinson v. United States, 365 U.S. 399 (1961) 15

Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966) 12

Yellin v. United States, 374 U.S. 109 (1963) 26

Zemel v. Rusk, 381 U.S. 1 (1965) 17

TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Article I, Section 5 10

Article I, Section 6, Clause 1 (Speech or Debate Clause) 2, 21

Article 1, Section 7 6

Legislative Reorganization Act of 1946 (60 Stat. 812) 3, 9, 11-15

H. Res. 8, 89th Cong. 1st. Sess., Jan. 4, 1965 ....9, 12, 15, 17

2 U.S.C. §§ 192, 194 12

19 U.S.C. §1351(a) 8

19 U.S.C. §1821 8

26 U.S.C. §8002 11

PAGE

28 U.S.C. §§ 1253, 2281, 2282 ..... 3, 4, 9, 15, 16, 19, 21

44 U.S.C. §1 11

50 U.S.C. §§792, 794, 798 8

Pub. L. 85-868 §2 8

Pub. L. 87-794 §274(c) 8

Pub. L. 88-408 8

Trading with the Enemy Act, §5, 40 Stat. 411, 415 8

Joint Res. Jan. 29, 1955, 69 Stat. 7 8

TABLE OF BOOKS, ARTICLES AND REPORTS

Borchardt, "Legislative Supremacy and Congressional Reorganization," 35 Geo. L. J. 310 (1946) 7

Committee on Un-American Activities, 1966 Annual Rep., H. Rep. 460 (1967) 14

———, Conduct of Espionage with the United States by Foreign Communist Governments (1967) 14

Corwin, The Constitution of the United States (1952) 9, 20

Dechsler, ed., House Rules and Manual, p. 23 §61 (1961 ed.) 11

Hoffman, "Congress Streamlined," 7 Fed. Bar J. 264 (1946) 7

Editorial, "Organization of Congress," 7 Fed. Bar J. 264 (1946) 7

Kefauver, "The Challenge to Congress," 6 Fed. Bar J. 325 (1946) 7

"Is Congress Outmoded?—A Study of Proposals for Reorganization, 34 Geo. L. J. 201 (1946) 7

Senate Report No. 1011, 79th Cong., 2d Sess. (1946) 7

Shull, "The Legislative Reorganization Act of 1946," 20 Temp. L.Q. 375 (1946) 7, 8

In the
Supreme Court of the United States

OCTOBER TERM, 1968

NOS. 478 and 479

JEREMIAH STAMLER, M.D. and YOLANDA F. HALL,
Plaintiffs-Appellants,

vs.

HON. EDWIN E. WILLIS, et al.,
Defendants-Appellees,

MILTON M. COHEN,
Intervening-Plaintiff-Appellant,

vs.

HON. EDWIN E. WILLIS, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

The response of the Solicitor General places this case in an extraordinary posture.

After three years of complicated litigation, the Court of Appeals for the Seventh Circuit directed the convening of a three-judge court, and the three-judge court unanimously denied appellees' motion to dismiss, ordered appellees to answer the complaints, and granted certain pretrial discovery motions.

With the pleadings at issue and preparation for trial thus begun, appellees urged dismissal on a ground never before relied upon, *viz.*, immunity from suit under the Speech or Debate Clause of the Constitution. A majority of the three-judge court accepted this contention and entered judgment for the appellees. It is this judgment the Solicitor is defending on appeal.

The Solicitor has now *abandoned* the ground upon which the majority of the three-judge court predicated its decision. This abandonment is a tacit confession that the Speech or Debate Clause affords no valid basis for dismissal of this case.

In an effort to salvage the result, the Solicitor undertakes to resurrect a series of contentions which have been made time and again to the various judges who have heard this case. Every one of those contentions has been previously advanced to and rejected by the three-judge court and the Court of Appeals. Thus, tacitly conceding that the majority below erred, appellees are in reality attempting to turn this into an interlocutory appeal from the prior decisions which were adverse to them.

In this posture of the case it is unnecessary to argue further the soundness of our contentions concerning the Speech or Debate Clause.

Rather, we shall concentrate our reply on two matters:

First, the Solicitor challenges the propriety of convening a three-judge court to hear appellants' constitutional challenge to Rule XI of the Legislative Reorganization Act. When this contention was rejected by the Court of Appeals for the Seventh Circuit, the government chose not to seek review in this Court. The contention was again rejected by the three-judge court when it denied appellees' motion to dismiss. We deal with this point in Part I, below.

Second, we deal in Part II with the various grounds rejected below but nevertheless raised in this Court by the Solicitor to justify dismissal of the complaints.

I.

A THREE-JUDGE COURT WAS PROPERLY CONVENED BECAUSE APPELLANTS SEEK AN INJUNCTION AGAINST ENFORCEMENT OF AN ACT OF CONGRESS.

The suggestion of the Solicitor that appellate review in this Court is not now appropriate rests upon a contention that a three-judge court was improperly convened in that the complaint did not seek an injunction against an "Act of Congress" within the meaning of Title 28 U.S.C. § 2282.

Since the complaint did in fact request an injunction against the enforcement of provisions of the Legislative Reorganization Act of 1946* which embody Rule XI, the charter of the Committee, this argument requires an assumption that the Legislative Reorganization Act is not an "Act of Congress" within the meaning of the three-judge court statute. Appellees unsuccessfully advanced this argument to the Court of Appeals for the Seventh Circuit in their petition for rehearing. It was rejected

---

* Titles I and II of the Legislative Reorganization Act of 1946 are attached hereto as Appendix A.

by the Court of Appeals *en banc*. After much deliberation,* the government decided not to seek review of that ruling in this Court. The contention was again pressed on the three-judge court in the motion to dismiss, and was again rejected. (4 R. 52.) Appellees now seek to raise the contention again, relying principally upon the majority opinion of the three-judge court in *Krebs* v. *Ashbrook*, 275 F. Supp. 111 (D.D.C. 1967), affirmed per curiam No. 21,382 (D.C. Cir. May 14, 1968), petition for certiorari now pending in this Court, No. 633.

We suggest to the Court that the rejection of this argument by both courts below, and the decision of the government not to appeal the ruling of the Court of Appeals, were based upon sound considerations. An analysis of both the Legislative Reorganization Act of 1946 and the decisions of this Court interpreting the scope and impact of Section 2282 reinforce the conclusion of the courts below that a three-judge court was properly convened here.

A.

The Rules Establishing and Governing the House Committee on Un-American Activities Are Embodied In and Are an Integral Part of the Legislative Reorganization Act of 1946.

Appellants seek a permanent injunction against enforcement of that portion of the Act of Congress known as the Legislative Reorganization Act of 1946** which estab-

---

* The government thrice requested the Court of Appeals to stay its mandate so as to afford the Solicitor General an opportunity to determine whether or not to seek review by this Court.

** Chapter 753, Section 121 (b) (Public Law 601, 79th Congress, 2nd Session, 60 Stat. 812, 828.)

lishes the House of Representatives Committee on Un-American Activities (the "Committee"). The Senate approved the Bill for this Act (S. 2177) on June 10, 1946, and the House approved the Bill with amendments on July 25, 1946. The Senate concurred in these amendments on July 26, 1946.* As in the case of all other Acts of Congress, the Bill was transmitted to President Truman for approval or veto. President Truman approved the Bill on August 2, 1946.

The portions of the Act establishing and governing the Committee have never been amended or repealed, and remain in full force.

This is indisputably an Act of Congress. It is so entitled:

> "An Act to provide for increased efficiency in the Legislative branch of the Government. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled . . .*"

The Act contains six Titles. Title I embodies rules of the Senate and the House of Representatives. Part 2 of Title I contains Rules X and XI of the House, which establish *(inter alia)* the Committee and define its functions. Part 3 provides for joint committees of Congress and numerous joint congressional procedures. This title is denominated as "an exercise of the rule making power of the House and Senate respectively . . . with full recognition of the constitutional right of either House to change such rules . . . ."

Title II contains miscellaneous administrative provisions dealing with personnel, the capitol, and administrative matters, affecting the functioning and procedure of the

---

* 92 Cong. Rec. 6578, 10104, 10152 (1946).

House and Senate. Part 1 of Title II is entitled "Statutory Provisions Relating to Congressional Personnel," and Part 2 is entitled "Statutory Provisions Relating to Congressional Committees." Title II authorizes appropriations to the standing committees, including appropriations for personnel of the House Committee on Un-American Activities. The Committee regularly makes and publishes reports with respect to its staff personnel and salaries and has in each instance stated that it has done so pursuant to § 134(b) of Title I of the Legislative Reorganization Act of 1946. *E.g.*, 111 Cong. Rec. 20003 (1965).

Title III concerns the regulation of lobbying. Title IV is the Federal Tort Claims Act. Title V is the General Bridge Act relating to the consent of Congress for bridges over navigable waters. Title VI concerns compensation and retirement pay of members of Congress.

The Short Title section makes clear that the title, "Legislative Reorganization Act of 1946," refers to all titles and sections. The Separability Clause likewise refers to "this Act."

Thus, it is clear that the Committee's creation and existence is provided for, and that its continued functioning is governed by, an Act of Congress which followed the usual course through both houses of Congress as required by Article I, Section 7 of the United States Constitution, and was submitted to and approved by the President as in the case of other Acts of Congress.

Appellees ask this Court to ignore the inclusion of Rule XI and other Rules in this Act of Congress by calling it an *"historical accident"* which is "deprive[d] . . . . of the legislative force ordinarily associated with statutes." (Motion to Dismiss or Affirm, p. 8; emphasis added.)

On the contrary, the Legislative Reorganization Act was a thoroughly considered legislative enactment. It was based upon the Report of a Joint Committee on the Operation of Congress,* co-chaired by Senator Robert M. LaFollette, Jr. and then Representative A. S. "Mike" Monroney, which held 39 public hearings and called 102 witnesses.** It attracted the attention of numerous commentators before, during, and immediately after its consideration and passage. See, *e.g.*, Hoffman, "Congress Streamlined," 7 Fed Bar J. 378 (1946); Editorial, "Organization of Congress," 7 Fed Bar J. 264 (1946); Kefauver, "The Challenge to Congress," 6 Fed. Bar 325 (1946); Comment, "Is Congress Outmoded?—A Study of Proposals for Reorganization," 34 Geo. L. J. 201 (1946); Shull, "The Legislative Reorganization Act of 1946," 20 Temp. L. Q. 375 (1946); Borchardt, "Legislative Supremacy and Congressional Reorganization," 35 Geo. L. J. 310 (1946).

The reorganization of "its present obsolete and overlapping committee structure" was termed in the Joint Committee Report "the first and most important test of whether Congress is willing to strengthen itself and its organization to carry the tremendous workload that present day governmental problems place upon it." (Report, p. 2.) See Hoffman, op. cit., 7 Fed. Bar J. at 380. It was only after intensive deliberation and debate covering 190 pages in the Congressional Record that Congress adopted changes in the Rules of both Houses affecting committee structure and in doing so resorted to statutory enactment. 92 Cong. Rec. 6344-46, 6365-75, 6390-98, 6439-54,

---

* Sen. Rep. 1011, 79th Cong., 2d Sess. (1946). ("Report")

** Report, p. 1.

6455-69, 6517-21, 6522-41, 6547-75, 10037-10104, 10139-52 (1946).

The propriety of the form of the enactment was drawn into question and hotly debated. 92 Cong. Rec. 6391-94, 6457, 10040, and 10064 (1946). See also Shull, p. cit. 20 Temp. L.Q. at 376.

The proviso in Title I, that either House may change the Rules contained in the Act, does not deprive the Act of legislative force, or in any sense make the Act other than an Act of Congress. Furthermore, insofar as pertinent here, the House has not exercised any such prerogative. Moreover, many other Acts of Congress, passed and approved in the usual fashion as was the Act in question, may be altered, repealed or rendered nugatory by other than the ordinary constitutional procedure. The Committee itself has taken credit for adoption of two such Acts of Congress, 50 U.S.C. § 792, which permits inaction by the Attorney General to terminate the existence of the Subversive Activities Control Board, and 50 U.S.C. §798 (enacted June 30, 1953), which permits the President to terminate 50 U.S.C. §794, an espionage statute, by declaring an end to the period of national emergency declared on December 16, 1950. In recent years, Congress has consistently permitted tariff reductions by Presidential action. 19 U.S.C. §1351(a); Pub. L. 87-794 §274(c); Pub. L. 85-868 §2; 19 U.S.C. §1821. See also Joint Res. Jan. 29, 1955, 69 Stat. 7 (President can terminate power to protect Formosa); Pub. L. 88-408, August 10, 1964 (President can terminate power to protect Southeast Asia); Trading with the Enemy Act §5, 40 Stat. 411, 415 (President given power to suspend operation of the statute). Similarly under certain circumstances a treaty may supersede a statute with-

out the concurrence of the House of Representatives. Corwin, ed., The Constitution of the United States, 421-22 (1952).

As Chief Judge Bazelon pointed out in his dissenting opinion in *Krebs* v. *Ashbrook,* (275 F. Supp. 111, 119-120): "Section 2282, however, speaks of 'any Act of Congress,' and neither Congress nor the Supreme Court has provided us with sufficient guidance to carve out exceptions to it."

Appellees also argue that any effect of the Legislative Reorganization Act on rules of the House was confined to the session of enactment. (Motion to Dismiss or Affirm, p. 9.) However, *precisely the opposite is true.* Title I containing changes in the Rules did not by its terms become effective until January 2, 1947, the opening of the *succeeding* 80th Congress. (§142).

It is thus clear that the Congress thought that the rules enacted in the Legislative Reorganization Act would be binding on subsequent Congresses, except insofar as specifically amended.

Appellees nevertheless argue that House Resolution 8 of the 89th Congress incorporating the Legislative Reorganization Act is "the operative act" and "hence the only appropriate point of challenge." (Motion to Dismiss or Affirm, p. 10.) Their principle authority is *Gojack* v. *United States,* 384 U.S. 702, 707, n.4.

However, that case did not directly involve the relevance of the Legislative Reorganization Act as a source of Committee authority. *Cf. Watkins* v. *U.S.,* 354 U.S. 178 (1957). In *Gojack,* the question was whether, in absence of a specific Committee authorization for an investigation, an indictment failing to allege such an authorization was defective despite an asserted "continuing investigation"

of the witness-defendant's labor union. This Court held that Congress had not authorized a continuing investigation. The Court added a dictum, in a footnote, that an *authorization* "must occur during the term of the Congress in which the investigation takes place. Neither the House of Representatives nor its committees are continuing bodies. *Cf., Anderson* v. *Dunn,* 6 Wheat, 204, 231; *Marshall* v. *Gordon,* 243 U.S. 521, 542."* This Court then commented that "It is the *practice* of the House to adopt its Rules—including [Rule XI]—at the beginning of each Congress." (Emphasis added.)

Appellees would subtly elevate this "practice" into a constitutional requirement. However, whatever may be the current practice of the House of Representatives with respect to biennial adoption of rules, the House has often enacted statutes or rules with the undertanding that they would govern procedure in the House during subsequent Congresses unless changed by rule pursuant to Art. I, Sec. 5 of the Constitution. In 1860, the House amended its rules providing (Cong. Globe, 36th Cong. 1st Sess. 1211-12 (1860)):

> "These rules shall be the rules of the House of Representatives of the present and succeeding Congresses unless otherwise ordered."

---

* Nor do these cases hold or suggest that the House must reenact its rules biennially. In *Anderson* v. *Dunn,* 6 Wheat. 204 (1821), this Court held that since the House has power to imprison those in contempt, an action for trespass brought by the contemnor after his release would not lie. The Court added in dictum that such imprisonments would be limited by adjournment or periodical dissolution. (6 Wheat. at 231.) In *Marshall* v. *Gordon,* 243 U.S. 521 (1917), this Court held that the contempt power did not extend to imprisonment of a United States Attorney for directing an intemperate letter to the chairman of a House committee. The Court in dictum cited the dictum in *Anderson* v. *Dunn, supra.*

The rule was adopted after Rep. Washburn gave assurances that the provision would not violate the Constitution because the House could change the rules at any time.

Relying upon this rule the House enacted no rules during the 41st, 42nd and 43rd Congresses. See statement by Senator Dawes, 4 Cong. Rec. 434 (1876).

A similar practice was followed from the beginning of the Government until 1876 under which certain of the affairs of Congress were governed by joint rules, occasionally amended but never reaffirmed by either House of Congress. Dechsler, House Rules and Manual, p. 23 § 61 (1961 ed.). In 1876, however, the joint rules were abrogated when the Senate conditioned their continuance upon reenactment by the House. See 4 Cong. Rec. 309-10, 431-38, 517-20, 5567 (1876). Nevertheless, in the next session of Congress, the Speaker maintained that the joint rules governed the House in each succeeding Congress without reenactment.*

The statutory provisions for joint committees of Congress created by the Legislative Reorganization Act and other statutes are similar to the old joint rules. See, *e.g.*, 26 U.S.C. §8002 (Composition of Joint Committee on Internal Revenue Taxation); 44 U.S.C. §1 (Composition of Joint Committee on Printing and Binding). Either house of Congress by a change of its rules or a refusal to act could render these statutes ineffective as was done to the joint rules. The House need not reenact or reaffirm

---

* See also 4 Hind's Precedents of the House of Representatives §§ 6743-54 (1907). This practice was referred to by Senators Vandenberg and LaFollette in support of the statutory form of rule changes in the Legislative Reorganization Act. 92 Cong. Rec. 6392-93 (1946).

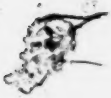
these statutes every two years. Nor must the House readopt 2 U.S.C. §§ 192, 194, which in part govern the internal congressional procedures for reporting and certifying a contempt of Congress, and under which appellants were reported and certified as in contempt of the Committee and indicted. See *Wilson* v. *United States,* 369 F.2d 198 (D.C. Cir. 1966).

In short, contrary to appellee's contentions, the Legislative Reorganization Act creates and governs the rules of the House and if anything it is House Resolution 8 that is surplusage. That Resolution is most revealing. It states that "all applicable provisions of the Legislative Reorganization Act of 1946 as amended, be, and they are hereby adopted as the Rules of the House of Representatives. . . . " H. Res. 8, 111 Cong. Rec. 21 (89th Cong. 1st Sess. Jan. 4, 1965).

House Resolution 8 assumes and is founded upon the continued viability of the Legislative Reorganization Act because:

1) It refers to the Act "as amended";
2) It refers to the Act as "applicable" and permits the terms of the Act to govern "applicability";
3) It incorporates by a single reference the myriad vital provisions for the functioning of the House as enacted in the Act.

The House Resolution understandably reasserts the underlying constitutional power to deviate from the Legislative Reorganization Act by the adoption of contrary rules. The House has not exercised that power in respect of Rule XI, Section 18q, of the Act establishing the Committee. The Act remains as the underlying authority for the Rules of the House.



B.

This Court, the Committee and the Executive Branch Have Uniformly Acknowledged That The Committee's Existence and Authority Are Based Upon an Act of Congress.

The lack of substance of appellees' contentions about the Legislative Reorganization Act is further demonstrated by the uniform acknowledgment of the Act as a source of authority by every organ of government which has expressed itself on the subject. This Court, in both majority and dissenting opinions, the Committee in its formal statements of its own authority, and the Department of Justice in the indictments in this very case, and in briefs submitted to the Court of Appeals in this very case* all uniformly acknowledge that the Legislative Reorganization Act is a statutory source of authority for the existence and functioning of the Committee. In view of the extensive and widely heralded congressional deliberations preceding the enactment of the Act, any other posture would have been inconceivable.

The Committee has cited the Act as the basis for its authority in each of its many publications issued from 1946 through 1967. For example, the Committee resolution authorizing the May, 1965, hearings in Chicago cites "Public Law 601" as the law which created the Committee. (Ex. 50, p. 326.) The Chairman of the Committee announced at the outset of those hearings that the Committee "is authorized by a rule of the House *and a Federal statute.*

---

* In their briefs to the Court of Appeals in the instant case the prosecutor-appellees stated: "The authority of the Committee on Un-American Activities of the House of Representatives to conduct investigations is found in Public Law 601, 79th Congress (1946), Chapter 753, 2d Session, 60 Stat. 812." (Appellee's brief in No. 15268-69, p. 4; Appellee's brief in 15668-69, p. 8)

. . . " (Ex. 50, p. 327; emphasis added.) Beginning on June 28, 1967, *after* having belatedly claimed in this very case that no Act of Congress is involved*, the Committee for the first time in its history, without explanation, omitted its customary reference to the Legislative Reorganization Act of 1946 from its publications.**

The prosecution-appellees have also claimed that the Legislative Reorganization Act of 1946 is the Committee's enabling act and charter. The indictments returned against appellants on July 18, 1967, as similar indictments returned over the years against other witnesses, commence as follows:

> "The Committee on Un-American Activities of the House of Representatives, *created and authorized by the Legislative Re-Organization Act of 1946,* Chapter 753, Sections 121 and 136 (Public Law 601, 79th Congress, Second Session, 60 Stat. 812, 822, 823 and 828) and by House Resolution 8 of the 89th Congress, adopted by the House of Representatives of the United States on January 4, 1965." (Emphasis added.)

Accordingly, the belated claim of the Committee and of the Department of Justice that Rule XI is not an Act of Congress, never advanced before this case, is at odds with the prior consistent (and we respectfully suggest, the correct and commonly accepted view) published declarations of the Congress, the Committee itself and the Department of Justice that the Committee's existence and powers emanate from an Act of Congress.

---

*Petition for Rehearing, pp. 29 to 31, filed in the Court of Appeals for the Seventh Circuit on January 3, 1967.

**1966 Annual Report, H. Rep. 460 (1967), p. VI; Conduct of Espionage with the United States by Agents of Foreign Communist Governments (1967), p. IV.

In reviewing a number of criminal prosecutions for contempt of this Committee, this Court has repeatedly referred to the Legislative Reorganization Act as a grant of authority to the Committee. In *Watkins* v. *United States*, 354 U.S. 178, 203 (1957), this Court recognized that "the Committee's charter was embodied in the Legislative Reorganization Act." See also *Barenblatt* v. *United States*, 360 U.S. 109, 120, fn. 15 (1959); *Wilkinson* v. *United States*, 365 U.S. 399, 401, fn. 2 (1961); *Deutch* v. *United States*, 367 U.S. 456, 475-76 (1961) (Whitaker, J. dissenting).

C.

The Dual Source of the Mandate of the Committee Does Not Deprive the Three-Judge Court of Jurisdiction

Even if the Committee's authority is also derived from Rules of the House adopted at the commencement of each Congress,* as well as from the Legislative Reorganization Act of 1946, a three-judge court is necessary. Since the rule is already incorporated in and made a part of the 1946 Legislative Reorganization Act, at best the House Resolution creates a dual source of authority for the mandate. Since the authorizing resolution incorporates by reference "all applicable portions of the Legislative Reorganization Act of 1946, as amended," the 1946 Legislative Reorganization Act continues to apply and it follows that the need for a three-judge court under 28 U.S.C. §2282 is in play. (H Res. 8, 89th Cong., 1st Sess., Jan. 4, 1965.)

---

* Appellants contend that those rules are "Acts of Congress" as those words are used in Section 2282; see Part E below.

As Chief Judge Bazelon said in his dissenting opinion, in *Krebs* v. *Ashbrook*, 275 F.Supp. 111, 119-20 (D.D.C. 1967):

> "By incorporating Rule XI into the Legislative Reorganization Act of 1946, 60 Stat. 812, Congress established a dual authorization for the House Committee on Un-American Activities. The Committee itself has not hesitated to state that it derives its mandate from an Act of Congress as well as from rules of the House. In my view, therefore, this case does involve an injunction to restrain enforcement of an Act of Congress and falls within provisions of 28 U.S.C. 2282. *The fact that plaintiffs are also trying to enjoin enforcement of a rule of the House does not render §2282 inoperative.*" (Emphasis added.)

The holding of this Court in *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960), dealing with the similar provisions of Section 2281 (relating to state statutes) is dispositive. The plaintiffs sought to enjoin the enforcement of a state statute on dual grounds, constitutional as well as non-constitutional. It was alleged that a California statute was violative of the Commerce and Equal Protection Clauses of the United States Constitution and of a federal statute. A three-judge court was convened, but it dismissed the action on the ground that Section 2282 applied only where either the sole ground or all grounds of attack were constitutional and that since one of the dual claims of invalidity was predicated on a federal statute, Section 2281 had been improperly invoked. This Court reversed (362 U.S. at 84-85):

> "To hold that only one judge may hear and decide an action to enjoin the enforcement of a state statute on both constitutional and nonconstitutional grounds would be to ignore the explicit language and the manifest purpose of § 2281, which is to provide for a three-

> judge court whenever an injunction sought against a state statute may be granted on federal constitutional grounds. Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though nonconstitutional grounds of attack are also alleged, we think the case is one that is '*required* by . . . Act of Congress to be heard and determined by a district court of *three* judges.' " (Emphasis in original.)

This rule has been uniformly followed by this Court. *Flast* v. *Cohen*, 392 U.S. 83, 90-91 (1968); *Zemel* v. *Rusk*, 381 U.S. 1, 5-6 (1965).

If a three-judge court is required to hear an attack upon a statute on both constitutional and non-constitutional grounds, it follows that a three-judge court is required to hear a constitutional attack upon an enactment which is contained in an Act of Congress and referred to in a House resolution.

D.

In Any Event, a Three-Judge Court Is Required to Hear Cases Involving Rule XI of the House of Representatives

Even if it be assumed, despite the authority to the contrary to which we have directed attention, that the Committee's authority is derived exclusively from House Resolution 8 of the 89th Congress, a three-judge court was nevertheless properly convened.

It is highly anomalous that appellees, members of the Congress and officers of the United States Government, urge otherwise. Section 2282 was intended "to prevent a single federal judge from being able to paralyse totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 155 (1963). The significance of congressional resolutions, and the deference owed them by the

courts, have been explained in *United States* v. *Rumely*, 345 U.S. 41 (1953). In that case this Court affirmed the reversal of a conviction for contempt of Congress by a witness summoned before a House Select Committee on Lobbying Activities which was established pursuant to a resolution of the House. This Court criticized the extremely vague language of the authorizing resolution, and adverted to the serious constitutional difficulties posed if the language of the resolution were to be construed to apply to the defendant.* This Court said (345 U.S. at 43, 45):

> "Although we are here dealing with a resolution of the House of Representatives, *the problem is much the same as that which confronts the Court when called upon to construe a statute* that carries the seeds of constitutional controversy. . . .
>
> * * *
>
> "Patently, the Court's duty to avoid a constitutional issue, if possible, applies not merely to legislation *technically speaking* but also to congressional action by way of resolution. [Citation.]" (Emphasis added.)

Like appreciation for the significance of congressional resolutions was shown in *Methodist Federation For Social Action* v. *Eastland*, 141 F. Supp. 729 (D.D.C. 1956). There a three-judge district court affirmed its jurisdiction to pass upon the merits of a complaint seeking to enjoin the Public Printer and the Superintendent of Documents from printing an allegedly false and defamatory Senate document pursuant to a Senate concurrent resolution. The complaint charged that the concurrent resolution violated plaintiff's constitutional rights. The court held by a two-

---

* The Court held that the resolution did not authorize the investigation of defendant. The *Rumely* case was followed in the last Term in *Schneider* v. *Smith*, 390 U.S. 17, 26-27 (1968) (statute construed to avoid constitutional issue).

to-one majority that the complaint failed to state a claim on which relief could be granted. The dissenting judge set forth his reasoning on the merits at length, but as to the question of three-judge court jurisdiction, the existence of which was recognized by the majority, he said (141 F. Supp. at 736):

> "The defendants say, 'The Court lacks jurisdiction of the subject matter in that Senate Concurrent Resolution Numeral 62 is not an act of Congress within the meaning of 28 U.S.C. Secs. 2282, 2284.' It seems inconceivable that Congress would recognize the power of such a three-judge court as this to restrain 'the enforcement, operation, or execution of any act of Congress or order of any department or agency of the United States for repugnance to the Constitution', and exclude from its consideration a Senate Concurrent Resolution."

In *Bond* v. *Floyd,* 385 U.S. 116 (1966), the plaintiff sought declaratory and injunctive relief against the enforcement of a resolution of the Georgia House of Representatives excluding him from his seat therein, as violative of his First Amendment rights. Plaintiff's appeal from the adverse ruling by a statutory three-judge district court was accepted by this Court under Section 1253, without apparent controversy (385 U.S. at 126.)

The decision of the Court of Appeals for the District of Columbia in *Powell* v. *McCormack,* 395 F.2d 577 (D.C. Cir. 1968), petition for writ of certiorari pending No. 138, is inapplicable. The Court of Appeals there held that a resolution of the House of Representatives denying a congressman his seat was not an "Act of Congress" within the meaning of Section 2282 since "it creates no broad statutory scheme which would be frustrated by injunctive relief,

and it does not contain the attributes of the usual 'Act of Congress'." (395 F.2d at 603.)*

This holding is of course inapposite because this case unlike *Powell* involves not only a resolution but an enactment that is clearly an Act of Congress. See Section A, above. In any event, whatever the scope of the resolution in issue in the *Powell* case, many congressional resolutions have the effect of a "broad statutory scheme," as the one in the case at bar. See Corwin, ed. The Constitution of the United States of America, 104 (1952). Indeed, in their petition for rehearing *en banc* in the United States Court of Appeals for the Seventh Circuit, the Committee asserted and relied upon a claim that judicial consideration of appellants' challenge to Rule XI would have far-reaching and "disastrous" effects. (Petition, pp. 2-3, 11-12.)

Acting under its charter, the members of the Committee and their predecessors have held some 174 hearings and summoned over 3,000 witnesses. (Appendix 5, p. 10, Table 1.) These hearings have been held in at least 32 cities outside of the District of Columbia, and in many cities more than one hearing was held. Many citizens have been prosecuted criminally as a result of appearances before the Committee. The Committee has circulated millions of its publications. See Appendix 4, pp. 134-138. As alleged in the complaint the Committee has deliberately held hundreds of witnesses up to public obloquy at hearings and in its reports and public actions.

The statutory three-judge court is created for the protection of the Government and of the public. It is to pro-

* In *Powell*, the extensive majority and concurring opinions were principally directed to the propriety of judicial review over rules and acts of the House of Representatives respecting its own membership.

vide for a three-judge rather than a single-judge court so as to bring to bear in these normally far-reaching and all important cases the combined judgment of one Circuit and two District Judges rather than a single District Judge. No transitory tactical purpose can justify the assertion that this protective device applies to resolutions of state legislatures but does not apply to far-reaching resolutions of the national legislature of the character under attack in this case. If Congress required in Section 2282 that a three-judge court must pass upon the constitutionality of (for example) an enactment for a federal dam project, it surely intended the protection of a three-judge court to determine the validity of a rule or resolution directly affecting the Congress itself and affecting the rights, privileges and immunities of citizens. (See *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 37 F. Supp. 93 (E.D. Okla. 1941), affd. 313 U.S. 508 (1941).)

II.

THE GROUNDS FOR AFFIRMANCE ADVANCED BY APPELLEES WERE UNANIMOUSLY AND CORRECTLY REJECTED BY THE COURT BELOW.

Appellees have shown scant interest in supporting the judgment appealed from on the ground relied on by the majority of the court below, *viz.*, the Speech or Debate Clause. Rather, appellees have shifted in this Court to a host of grounds for affirmance which are not even mentioned in the opinion of the court below, and indeed which were tendered to and rejected by the Court of Appeals for the Seventh Circuit and by all members of the three-judge court. (See Motion to Dismiss or Affirm, p. 18.)

The various grounds for affirmance urged by the Solicitor will be found in the briefs filed with the Court of Appeals in support of Judge Hoffman's original dismissal of the

complaints, and with the three-judge court in support of appellees' renewed motions to dismiss the complaints following the Court of Appeals' reversal.

The court below *unanimously* denied appellees' motions to dismiss, and directed appellees to answer the complaints. (4 R. 52, Nov. 8, 1967). The brief discussion of these contentions which follows is submitted in the event this Court deems that they are properly raised at this time.

MOOTNESS

[Motion to Dismiss or Affirm, p. 13.]

The Committee first argued that this case was moot in August, 1965, in a motion to dismiss appellants' first appeal to the Court of Appeals. (Filed August 19, 1965, p. 4.) The claim was renewed in the Court of Appeals on the ground that the hearings had been held. (Appellees' Brief, No. 15268-9, pp. 20-21). In their petition for rehearing *en banc* to the Court of Appeals, the Committee argued the case was moot because the House of Resolutions had adopted contempt resolutions. (Petition, pp. 31-34). Appellees argued to the three-judge court that the return of indictments against appellees rendered the case moot. (Appellees' Memorandum in Support of Motion to Dismiss, pp. 12-16.)

All of these contentions were rejected by all of the judges who sat on the case.

This case is far from moot. Appellants are under indictment and face imminent prosecution. They ask the court to enter a judgment declaring the Committee's enabling Act to be unconstitutional, and that the May, 1965 hearings and the subpoenaes served on appellants were invalid, and to enjoin further operation and enforcement of that Act and further prosecution of the criminal cases against appellants.

STANDING

[Motion to Dismiss or Affirm, p. 18.]

This argument also has been repeatedly advanced by appellees*, but with no greater acceptance than the others discussed in this part.

It borders on the ludicrous to urge that appellants lack standing. They have been singled out for compulsory appearance before the Committee, and as a direct result they stand indicted for a federal crime. They have intense, concrete, personal interest in the outcome, and adequately represent all other citizens similarly situated. Of their standing to maintain this action there can be no doubt. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 140-141 (1951); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 284 (1961); *Baker* v. *Carr,* 369 U.S. 186, 208 (1962); *Flast* v. *Cohen,* 392 U.S. 83, 99-103 (1968).

ADEQUATE REMEDY IN DEFENSE OF CRIMINAL CASES.

[Motion to Dismiss or Affirm, pp. 13-16]

This argument** too has been rejected by the Court of Appeals and by the three-judge court.

One of the primary purposes of these cases is to obtain adjudication of appellants' constitutional claims in a civil rather than a criminal forum, in order to avoid the obloquy of a criminal trial and in order to secure a judgment which will have precedential value rather than a jury verdict of guilty or not guilty.

---

* Appellees' Brief, No. 15268-9, pp. 22-23; Appellees' Petition for Rehearing en Banc, pp. 23-26; Appellees' Memorandum in Support of Motion to Dismiss, pp. 17-22.

** Appellees' Brief, No. 15268-9, pp. 22, 27-31; Appellees' Petition for Rehearing en Banc, p. 27; Appellees' Memorandum in Support of Motion to Dismiss, pp. 38-42.

The Solicitor agrees that *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), sets forth special standards for equitable relief from criminal prosecutions in the area of First Amendment rights, and that the principles in that case apply to federal as well as to state statutes. Furthermore, the Solicitor concedes, as he must, that this case "involves allegations of a 'chilling effect' on appellants' and others' exercise of their First Amendment rights, and assertions that this effect is the result of an overbroad enactment uncontained by acceptable narrowing constructions."* (Motion to Dismiss or Affirm, p. 14.)

The Solicitor argues however that this case is distinguishable from *Dombrowski* and similar cases in "one crucial respect", that is, "the allegations of 'chill' entirely lack the personal concreteness" of past cases where defense of a criminal prosecution " 'will not assure adequate vindication of constitutional rights' . . ." (Motion to Dismiss or Affirm, p. 14.)

This contention ignores the allegations of appellants' complaint, *which stand admitted* at this phase of the case. It is hard to imagine allegations which more directly involve:

1. Personal, concrete, adverse impact of a statute upon appellants.

2. Personal, concrete, adverse impact of a statute upon other citizens similarly situated.

3. The existence of a far reaching chilling effect impairing and restricting the exercise of First Amendment

*Appellants also contend that subsequent narrowing construction would not cure the Act. *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); Jurisdictional Statement of Appellants Stamler and Hall, pp. 39-40.

rights throughout the society at large.* (See Jurisdictional Statement of Appellants Stamler and Hall, pp. 18-20.)

At this juncture, appellants' need for equitable relief must be determined on the basis of the allegations of their complaints. Whether or not appellants will establish facts which bring this case within the principles of *Dombrowski* and similar cases must, of course, await the trial.

SEPARATION OF POWERS

[Motion to Dismiss or Affirm, pp. 6-19.]

In making this contention, appellees cite the same cases as they have throughout this case.** Not one of the many judges who have considered this case has accepted this argument.

---

* Contrary to the appellees' statement, the factual circumstances in *Dombrowski* are extremely close to the facts presented in the case at bar:

(i) Here, as in *Dombrowski,* at the time of the filing of the complaints, there were no indictments pending against appellants.

(ii) Here, as in *Dombrowski,* appellants were threatened with criminal prosecution when the second complaint was filed.

(iii) Here, as in *Dombrowski,* criminal indictments were instituted against the appellants during the pendency of the civil case.

(iv) Here, as in *Dombrowski,* the appellants alleged that the statute was being applied in bad faith to deter the free exercise of First Amendment rights and not to obtain valid convictions.

(v) Here, as in *Dombrowski,* the appellants challenge the facial constitutionality of a statute operating in the area of the First Amendment rights.

(vi) Here, as in *Dombrowski,* success in defense of a criminal prosecution will not vindicate and protect the First Amendment rights of appellants and others threatened and inhibited by the statute.

** *Fischler* v. *McCarthy,* 117 F. Supp. 643 (S.D.N.Y. 1954), affirmed on other grounds, 218 F.2d 164 (2d Cir. 1954); *Pauling* v. *Eastland,* 288 F.2d 126 (D.C. Cir. 1960), cert. denied 364 U.S. 900; *Methodist Federation* v. *Eastland,* 141 F.Supp. 729 (D.D.C. (1956). Appellees' Brief, No. 15268-9, pp. 33-38; Appellees' Petition for Rehearing en Banc, pp. 10-15; Appellees' Memorandum in Support of Motion to Dismiss, pp. 42-49.

Appellants do not seek to interfere with the internal operations of Congress. Rather, they seek relief from an unconstitutional Act of Congress. The court's power to adjudicate this issue and award appropriate relief is beyond question. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177-78 (1803); *Kilbourn* v. *Thompson,* 103 U.S. 168, 199 (1880).

Nor can there be any doubt that the United States Constitution limits the activities of federal congressional investigating committees, and that the courts have authority to rule upon the legality of committee procedures. See, e.g., *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880); *Yellin* v. *United States,* 374 U.S. 109 (1963); *Gojack* v. *United States,* 384 U.S. 702 (1966); *Watkins* v. *United States,* 354 U.S. 178 (1957).

JUSTICIABILITY

[Motion to Dismiss or Affirm, pp. 18, 20-21.]

The justiciability of this case cannot be seriously questioned.* There is presented here a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. . . ." *Evers* v. *Dwyer,* 358 U.S. 202, 203-4 (1958). There is nothing abstract about appellants' challenge to the Committee's charter or to their prayer for declaratory and injunctive relief concerning the charter and the pending criminal prosecutions.

Appellees argue that in the future the House of Rrepresentatives may repeal the Committee's authorization, and that the Committee's membership and procedures may change. (Motion, p. 18.) This speculation—which is in the teeth of 22 years of unhappy experience—does not

* Appellees' Brief, No. 15268-9, pp. 22-23; Appellees' Petition for Rehearing en Banc, pp. 26-29; Appellees' Memorandum in Support of Motion to Dismiss, pp. 19-22.

meet the issue. Every Act of Congress may be repealed or amended, or its mode of enforcement changed, but those possibilities do not prevent courts from adjudicating rights under those Acts or their constitutionality. See *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

CONCLUSION

Appellees have written off the reasoning of the majority of the court below. They assert instead objections to this Court's direct appellate jurisdiction and defenses to the complaint, all of which were rejected by both the three-judge court and the Court of Appeals.

Appellants pray that the Court reverse the judgment below.

Respectfully submitted,

HARRY KALVEN, JR.
University of Chicago
Law School
Chicago, Illinois 60637

RICHARD ORLIKOFF
33 N. Dearborn Street
Chicago, Illinois 60602

Attorneys for Intervening-Plaintiff-Appellant Milton M. Cohen

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
CHESTER T. KAMIN
DAVID C. ROSTON
RONALD J. CLARK
135 South La Salle Street
Chicago, Illinois, 60603

ARTHUR KINOY
NANCY STEARNS
511 Fifth Avenue
New York, New York 10017

Attorneys for Plaintiffs-Appellants Jeremiah Stamler, M.D. and Yolanda F. Hall

Of counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 South La Salle Street
Chicago, Illinois 60603
RAndolph 6-0220
October 31, 1968